F. M. S. REPORTS.

[ORIGINAL CIVIL JURISDICTION]

MURRAY-AYNSLEY, J.

December 15, 1939.

YAP TOW ON

v.

WOON NGEE YEW (f) & 7 OTHERS.

[PERAK CIVIL SUIT No. 101 of 1939]

Distribution Enactment (Cap. 71) S. 4—Chinese intestate—adopted son of different "Seh"—whether entitled to share in deceased's estate—conflict of laws.

Held, that the Distribution Enactment has taken away all rights of succession of adopted children; that an adopted son of a Chinese intestate can only have any rights if the intestate retained a Chinese domicile and that such rights are confined to movable property only.

Held also, that even if the intestate had a Chinese domicile, the adoption in this case which took place in Perak was invalid by local law as it was of a kind prohibited by the Perak Order in Council No. 23/93, the adoptee being of a "Seh" not that of the adopter, and there being nothing to show that the case came within any of the exceptions.

Held further, on the evidence, that the intestate had acquired a domicile in Perak and that therefore the plaintiff's claim failed.

Cases referred to:—

(1) *In re School Board Election for the Parish of Ellenborough, Bourke v. Nutt,* (1894) 1 Q.B.D. 725.

(2) *Ward v. British Oak Insurance Co., Ltd.,* (1932) 1 K.B. 392.

(3) *Winans v. Attorney General,* (1904) A.C. 287.

TRIAL OF ACTION.

H. Y. Teh (*H. S. Ong* with him) for the Plaintiff. The plaintiff is a natural and lawful son of the deceased, Yap Swee, and as such is entitled to a share in the estate of the deceased. This is a question of fact for the Court to decide from the evidence before it. The defence admits that the plaintiff is an adopted son adopted by the deceased during his lifetime in 1915.

The question then arises as to what rights the plaintiff has if the admission of the defendants is accepted. He referred to the Perak Order in Council and the Distribution Enactment. The Enactment applies to all races except Mohammedans. Both Hindus and Chinese recognise adoption. Perak Order in Council legalises it. He referred to Bryan on Chinese Civil Law, page 27. "The effect of adoption in Chinese law is to all intents and purposes to make the adopted son a natural son of the adopter..... An adopted son cannot inherit any estate from his natural parents". He also referred to Jameison on Chinese Family Law, page 21—"A son once formally adopted... inheritance of his share in that family property". "An adopted son loses his former status and rights and acquires a new status and new rights".

Is the Distribution Enactment to take away his acquired rights and status without restoring his former rights and status? If this is so, a big class of subjects will be penalised unfairly and unjustly. He referred to Section 15 of the Interpretation Enactment, Cap. 1. The Distribution Enactment should therefore be held not to be retrospective as to take away the status and rights of adopted sons without restoring their former status. He cited *In re School Board Election for the Parish of Ellenborough, Bourke v. Nutt,*(1) *Ward v. British Oak Insurance Co., Ltd.*(2). He referred to Section 3 of the Enactment. "Child" means a legitimate child and where the deceased is permitted by his personal law a plurality of wives includes a child by any of such wives, but does not include an adopted child". This clause is ambiguous and badly worded considering its importance. But for the insertion of a comma after the word wives, a different interpretation would arise. Section 4 is senseless. Sub-section (ii) says "The distribution of the immovable property of a person deceased shall be regulated by this Enactment, *wherever he may have had his domicile at the time of his death*", whereas Section 7 and the rules under that section only apply to persons who at the time of their death are domiciled in one of the Federated Malay States. Therefore if the domicile of the deceased is China, then the rules as laid down under Section 7 will not apply.

He submitted that the distribution in such a case should follow the principles as laid down in the Perak Order in Council. The question of domicile is important. He cited *Winans v. Attorney General,* (1904) A.C. 287. It is a question of fact whether the deceased has abandoned his domicile of origin and the onus of proof is on the defendants.

Rix for Defendants, 1, 2, 3, 5, 6, 7 and 8. Deceased, according to the plaint, was domiciled in Perak. The allegation that the deceased was domiciled in China cannot be raised in the course of the trial and must be properly pleaded. If the Plaintiff is an

adopted son of the deceased, he is not entitled to any share in the estate. Distribution Enactment (Cap. 71) Section 3. The burden is on the plaintiff to prove that he was a natural son of the deceased. Registration of births was compulsory in Perak as early as 1886. (Order in Council 1886) and was compulsory in 1914 under Perak Enactment No. 2 of 1901. The law presumes that all acts have been done rightly and regularly—accordingly the presumption is that the plaintiff's birth was registered. A birth certificate is the best evidence of such birth and no certificate has been produced. The evidence recorded by Mr. N. A. Worley (as he then was) in a case in the Chinese Protectorate in Ipoh in 1917 is admissible under Section 80 of the Evidence Enactment (Cap. X) as Mr. Worley was recording evidence given in a judicial proceeding under the Secretary for Chinese Affairs Enactment 1890. The adoption agreement filed as an exhibit in that case is also admissible.

Defendant No. 4 in person.

Cur. Adv. Vult.

Murray-Aynsley, J.—In this case the Plaintiff claims to be a natural son of the deceased, and asks for consequent relief.

As to this question of fact I think it was so clearly established that he was an adopted son that I do not think that it is worth while considering the evidence in detail.

At the hearing his counsel claimed that even if adopted he would have certain rights in the property of the deceased. This was not the case of the Plaintiff as pleaded but the matter having been raised it may save future litigation if I dispose of it now.

I think it is clear that the Distribution Enactment took away all rights of succession of adopted children, although an argument to the contrary was set up at the hearing. Therefore the Plaintiff could only have any rights if the deceased had retained his domicile of origin which was admittedly Chinese, and further this would only extend to movable property; although on this point also an argument to the contrary was made at the hearing. I think that Section 4 would govern the matter.

Even if the deceased had a Chinese domicile, I should hold the adoption which took place in Perak invalid by local law as it was of a kind prohibited by the Perak Order in Council, the adoptee being of a "seh" not that of the adopter, and there being nothing to show that the case came within any of the exceptions.

If I am wrong in any of these points of law, it is possible that the question of domicile may be of importance and I will therefore deal with it. As I said before the domicile of origin of the deceased was admittedly Chinese. The Defendants have therefore to show that he acquired one in Perak. At the hearing both sides gave evidence of alleged expressions of intention by the deceased. I do not attach any importance to these. The only material from which one can form an inference is I think the facts of the career of the deceased.

As to general outline of the career of the deceased there is no doubt his career is a very typical one of a successful mining Towkay in this State. He arrived in humble circumstances from somewhere in the Dutch East Indies where he had proceeded from China. Whether or no he was actually an indentured coolie it is clear that his circumstances were humble. The rest of his career until his death took place in the district of Kinta. His mining enterprises gradually expanded and at the time of his death at the age of 56 he was actively engaged in mining enterprises.

It is clear that the deceased had no property in China, that he never visited nor is there any evidence of any communication with, that country.

On the part of the Defendants stress is laid on the fact that deceased erected a tomb for his parents in Ipoh and if he had lived longer would have buried a silver plate there to represent them. Without evidence of Chinese custom I am unable to form an opinion as to the significance of this.

On the part of the plaintiff stress was laid on the fact the deceased was content to house himself and his wives in shop houses in Menglembu and did not erect one or more of the large mansions which are the usual abodes of a successful Towkay.

Be this as it may, and judging by the habits of others of his class, I am of the opinion that the deceased acquired a domicile here; it is easier to assume a change of domicile in the case of a Chinese than in the case of a European.

For these reasons the claim fails and there must be judgment for defendants, other than the fourth defendant who did not defend the suit, with costs.

Defendants (other than 4) to be reimbursed (Solicitor and client) from estate for costs not recovered from Plaintiff.

Claim dismissed.